No. 18-7503

IN THE
SUPREME COURT OF THE UNITED STATES

ABDUR RAHIM AMBROSE,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

BRIEF IN OPPOSITION

JIM HOOD
Attorney General State of Mississippi

JASON L. DAVIS
Assistant Attorney General

LaDONNA C. HOLLAND
Special Assistant Attorney General
Counsel of Record

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

Questions Presented

1. Capital Punishment Does Not Violate the Eighth Amendment.

2. The Jury's Finding of a Single *Enmund* Factor Pursuant to Mississippi Code Annotated Section 99-19-101(7) is Constitutionally Sufficient to Support the Sentence Imposed.

Parties to the Proceeding

Respondent is the State of Mississippi.

Petitioner, Abdur Rahim Ambrose, is an inmate at the Mississippi State Penitentiary at Parchman, Mississippi, who has been sentenced to death.

Table of Contents

Table of Authorities

No. 18-7503

IN THE
SUPREME COURT OF THE UNITED STATES

ABDUR RAHIM AMBROSE,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

BRIEF IN OPPOSITION

This matter is before the Court on the Petition of Abdur Rahim Ambrose ("Petitioner") for a Writ of Certiorari to the Supreme Court of the State of Mississippi wherein he challenges his sentence of death. Respondent, the State of Mississippi, asks this Court to deny his Petition for Writ of Certiorari to the Supreme Court of Mississippi.

Opinion Below

The opinion of the Mississippi Supreme Court affirming Petitioner's capital murder conviction and sentence of death (Pet. App. A) is reported at 254 So. 3d 77 (Miss. 2018).

Jurisdiction

The judgment of the Mississippi Supreme Court was entered on August 2, 2018. A motion for rehearing was denied on October 18, 2018. (Pet. App. B). The petition for a writ of certiorari was filed on January 15, 2019. Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

Statement of the Case

Abdur Rahim Ambrose and Robert Trosclair had been friends for nearly a decade. But Ambrose and two other men[1] beat Trosclair to death because Ambrose suspected Trosclair of having broken into his vehicle. The two hour fatal beating began with Ambrose and his cohorts beating Trosclair with their fists and kicking and stomping him until he was unrecognizable. T. 388-389, 465, 467. Ambrose and his cohorts then loaded the victim, still alive, into the back of a pick up truck, and Ambrose drove the victim to a second location where they continued to beat him mercilessly. Trosclair attempted to escape, but Ambrose chased him down. The three men then beat the defenseless Trosclair with a fully inflated tire and rim and a garden hose reel until he was unresponsive. The victim was then bound with a rachet tow strap and

[1]Stevie Creon Ambrose, Sr. (Abdur Ambrose's brother) and Orlander Patrick Dedeaux, II participated in the fatal beating and were also indicted for capital murder.

dumped on the side of the road, where he was discovered by a passerby.

Ambrose was airlifted to University of South Alabama Medical Center in Mobile, Alabama. T. 522, 683. His brain was severely swollen and had shifted 4 millimeters to the left, a life threatening injury. T. 686-687. Other noted injuries included jaw and nasal bone fractures and lacerations to the flank. T. 688. Trosclair never regained consciousness and was declared brain dead and removed from life support.[2] T. 381, 691-692.

Ambrose and his cohorts were indicted for capital murder. C.P. 15. Prior to Ambrose's trial, defense counsel filed a pro forma motion to quash the indictment and declare the death penalty unconstitutional. C.P. 96-100.

At trial, the State presented three eyewitnesses to Trosclair's kidnapping and fatal beating. T. 387-391, 465-467, 501-506. In addition to three eyewitnesses establishing Ambrose's guilt beyond a reasonable doubt, Ambrose testified on his own behalf and admitted that he participated in the fatal beating. T. 722-723, 728, 742-765. Ambrose insisted, however, that he did not kidnap the victim and did not intend to kill him. T. 738.

A Harrison County Circuit Court jury found Ambrose guilty of capital murder.

---

[2]The forensic pathologist who performed Trosclair's autopsy testified that "multiple blunt trauma, multiple sharp wounds (including three stab wounds to the flank), and asphyxia by strangulation" were the injuries which caused Trosclair's death. T. 538, 544, 546. Trosclair's substantial head injuries included hemorrhaging in the front and right side of the subgalea area, subdural hemorrhage, and hemorrhaging to the pons. T. 538-544. The pathologist determined that Trosclair had also been strangled based on "hemorrhages in the strap muscles and the hemorrhages in the eyes which correlate with that." T. 544. Additionally, Trosclair had "diffuse superficial abrasions" all over his body. T. 542.

Pet. App. A at ¶1. After a cooling off period and having considered the aggravating circumstances evidence presented by the State and testimony from nine mitigation witnesses presented by the defense, the jury reached a verdict which complied with the requirements of Mississippi Code Annotated Section 99-19-101 and read as follows:

> We the Jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the Capital Murder.
>
> Section A:
>
> That the Defendant contemplated that lethal force would be employed.
>
> Next we, the Jury, unanimously find that the aggravating circumstances of:
>
> 1. The capital offense was committed when the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a kidnapping.
>
> 2. The capital offense was especially heinous, atrocious or cruel.
>
> exists beyond a reasonable doubt and is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the Defendant should suffer death.

C.P. 518.

In order for a Mississippi jury to return a sentence of death, among other requirements found in Mississippi Code Annotated Section 99-19-101, it must return a written finding of at least one of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

Pet. App. A at ¶77 (quoting Miss. Code Ann. §99-19-101(7)). The Mississippi Legislature enacted Mississippi Code Annotated Section 99-19-101(7) as a direct result of this Court's decision in *Enmund v. Florida*, 458 U.S. 782 (1982). Pet. App. A. at ¶75.

The Petitioner perfected a direct appeal in which he raised twelve issues and numerous sub-issues for consideration. The Mississippi Supreme Court rejected each claim and issued a decision affirming Ambrose's conviction and sentence. (Pet. App. A). As to the Petitioner's claim that capital punishment is per se unconstitutional, the Mississippi Supreme Court held, "The Supreme Court has 'time and again reaffirmed that capital punishment is not *per se* unconstitutional.'" (Pet. App. A at ¶254) (quoting *Glossip v. Gross*, --- U.S. ---, 135 S.Ct. 2726, 2739 (2015)). As to the Petitioner's *Enmund* argument, the Mississippi Supreme Court held, as it has previously, that a jury finding only a single factor pursuant to Mississippi Code Annotated Section 99-19-101(7) comports with the requirements of *Enmund*. (Pet. App. A at ¶¶74-95). Relying on *Tison v. Arizona*, 481 U.S. 137 (1987), the state court also found that the *Enmund* culpability requirement was satisfied, "given Ambrose's major participation [in] the kidnapping, combined with reckless indifference to human life." Pet. App. A. at ¶85.

Rehearing was denied on October 18, 2018, and the mandate issued on October 25, 2018. Aggrieved by that decision, Ambrose filed a petition for writ of certiorari on January 15, 2019.

Reasons for Denying the Petition

Ambrose's Petition contains two questions. Petitioner's first plea, that this Court strike down capital punishment as unconstitutional, has been repeatedly rejected by this Court. Petitioner offers no compelling reason for this Court to disturb its well-settled precedent. Petitioner's second claim, that his sentence of death should be reversed because the jury's sole *Enmund* culpability finding was that Petitioner contemplated that lethal force would be employed, was correctly decided by the state court consistent with this Court's precedent. Therefore, the State of Mississippi respectfully submits that certiorari should be denied.

I. Capital Punishment Does Not Violate the Eighth Amendment.

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). As this Court has repeatedly explained, "the Eighth Amendment's protection against excessive or cruel and unusual punishment flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Id.* (quotation and marks omitted). Grounded in that principle, this Court has held that the Eighth Amendment prohibits capital punishment for defendants who either: (1) had a diminished culpability for the crime (*e.g.* juveniles or those with intellectual disabilities); or (2) committed a crime that is disproportionate to a capital sentence (*e.g.* non-homicide offenses against individuals). *Id.* at 420–21.

Ambrose's culpability and the egregious nature of his crime are apparent. Robert Trosclair was fatally beaten for two hours by Ambrose and two others, all of whom purported to be his friends. Trosclair's fatal injuries alone included three stab wounds to the abdominal area, substantial head trauma (including hemorrhaging in the front and right side of the subgalea area, subdural hemorrhage, and hemorrhaging in the pons), and strangulation. T. 538-544. In addition to the numerous fatal injuries, Trosclair's body was covered in abrasions after the two hour beating. T. 542. He was then dumped on the side of the road, where he struggled to breathe[3], until emergency medical personnel arrived. Additionally, death was not immediate; the victim remained on life support for several days before being declared brain dead. Further, evidence of the circumstances leading up to the killing and the victim's mental anguish supported submitting the "especially heinous, atrocious or cruel" aggravating circumstance to the jury for consideration. That evidence included the fact that three of the victim's so-called friends brutally beat him at one location, took him against his will to a second location, prevented his escape, then beat him with their fists, repeatedly stomped him with their feet, and beat him with objects, all while the victim remained defenseless.

Ambrose claims that the brutal murder was a run of the mill homicide. In doing so, Petitioner ignores his culpability and the egregious manner in which he committed his crime, arguing instead that this Court should find that capital punishment is *per*

[3]Both the passerby who found the victim and the first law enforcement officer to arrive on the scene described a "gargling" or "gurgling" sound produced by the victim's labored breathing. T. 439-440, 452-53.

se cruel and unusual because "a national consensus rejects the death penalty." But Petitioner's contention is simply untrue. Thirty states and the federal government authorize the death penalty.[4] And while the Petitioner cites statistics which he claims illustrate that national support of the death penalty is waning, this Court has identified the actual reason for the decline in lawful executions: after legal and constitutional challenges to capital punishment failed, death penalty abolitionists "pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip v. Gross*, ---U.S.---, 135 S. Ct. 2726, 2733 (2015). The *Glossip* court also stated, "[I]t is settled that capital punishment is constitutional . . . ." *Id.* at 2732. Petitioner points to nothing which has transpired in the three years since *Glossip* was decided which would cause the Court to disturb the decidedly settled matter.

Petitioner also argues that the death penalty is unconstitutional because of racial and geographic arbitrariness of its imposition. Petitioner's argument concerning alleged racial arbitrariness is an equal protection claim, despite the fact Petitioner declines to address it as such. Petitioner's reliance on various studies is insufficient to support an equal protection claim under this Court's capital jurisprudence.[5]

---

[4]http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last visited February 12, 2019). This content has not been update to reflect the fact that the state of Washington abolished the death penalty on October 11, 2018. See *State v. Gregory*, 192 Wash. 2d 1 (2018).

[5]Petitioner offers a spreadsheet of death sentences imposed in Mississippi. Pet. App. D. However, that spreadsheet has never been offered as evidence in the state court, and therefore, cannot be used to support his Petition. "[W]e must look only to the certified record in deciding questions presented." *McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed.2d 762 (1910). Likewise, appendix E to the Petition was never offered in state court and must suffer the same fate.

McCleskey v. Kemp, 481 U.S. 279, 291-93 (1987). Perhaps realizing that he presents an insufficient equal protection claim under *McCleskey*, Petitioner claims that this Court "abandoned the tone of *McCleskey*" in *Buck v. Davis*, --- U.S. ---, 137 S.Ct. 759 (Feb. 22, 2017). But the issue in *Buck* was whether that capital defendant received ineffective assistance of counsel for trial counsel's use of an expert who, in addressing future dangerousness, opined that the defendant was "statistically more likely to act violently because he is black." *Id*. *Buck* simply did not alter the requirement that Ambrose prove "the existence of purposeful discrimination," and that "the decisionmakers in his case acted with discriminatory purpose" to succeed on his equal protection claim. *McCleskey*, 481 U.S. at 292. Ambrose offered no such evidence in the court below or to this Court. As such, his race based equal protection claim necessarily fails.

As for Petitioner's claim that geography arbitrarily determines who among those eligible will be sentenced to death, again, this Court has repeatedly rejected the argument that the Eighth Amendment limits prosecutors' discretion in determining whether to seek capital punishment. E.g. *McCleskey*, 481 U.S. at 306-07 (denying claim that prosecutorial discretion creates an arbitrary application of the death penalty). This Court has never held that the Eighth Amendment prohibits different counties within a State from applying state law as best they can, subject to resource constraints. See *Allen v. Stephens*, 805 F.3d 617, 629 (5th Cir. 2015), cert. denied, 136

S. Ct. 2382 (2016) (abrogated on other grounds by *Ayestas v. Davis*, --- U.S. ---, 138 S. Ct. 1080 (2018)). That is because, as this Court explained, "[n]umerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence," including the capabilities and resources of the particular law enforcement agency. *McCleskey*, 481 U.S. at 307 n.28. Because of the many factors that prosecutors weigh in deciding whether to seek a capital sentence, it is difficult, if not impossible, to know whether Ambrose would have been treated identically in each county in Mississippi. The entirety of the record demonstrates that the prosecutor in this case objectively and reasonably pursued a capital sentence.

Although Petitioner's present counsel argues that Ambrose was sentenced to death based on his race and the district in which the capital murder was committed, it is important to note that Ambrose's trial counsel, the public defender of Harrison County, contradicted Petitioner's present claim on the record. At the post-trial hearing on Ambrose's Motion for New Trial or, in the Alternative, for Acquittal Notwithstanding the Verdict, trial counsel stated the following after arguing that the death penalty is unconstitutional:

> Mr. Rishel: And, your Honor, I would like to also say that I've never been treated unfairly by anybody in this courtroom, including the state, and **I don't think they've ever been unfair to my clients on the basis of their race or their ethnic origins**, but I think what I'm arguing about is the state of law in the State of Mississippi.
>
> The Court: In the State of Mississippi. I understand. You weren't directing that at anybody here locally.
>
> Mr. Rishel: Yes, sir. The de facto de jure, existence of it today.

Supp. C.P. 9. Certainly the public defender of Harrison County, one of three counties

in the Second Circuit Court District of Mississippi, is in a better position than Ambrose's present counsel to gauge whether the prosecutors in his district exercise their discretion in an unconstitutional manner.

Ambrose presents nothing new or novel to cause this Court to retreat from decades of precedent or its fairly recent pronouncement that "it is settled that capital punishment is constitutional . . . ." *Glossip* at 2732.

II. The Jury's Finding of a Single *Enmund* Factor Pursuant to Mississippi Code Annotated Section 99-19-101(7) is Constitutionally Sufficient to Support the Sentence Imposed.

Petitioner claims that the jury's finding that he contemplated lethal force would be used is an insufficient culpability finding to support a sentence of death pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). Petitioner's understanding of those authorities is incorrect, and the Mississippi Supreme Court's resolution of Petitioner's claim is in accord with this Court's precedent.

Among the requirements for returning a sentence of death, Mississippi law demands that the sentencing jury submit a written finding that the defendant did one or more of the following: actually killed, attempted to kill, intended that a killing would take place, or contemplated that lethal force would be used. § Miss. Code Ann. 99-19-101(7). Petitioner's sentencing jury unanimously found beyond a reasonable doubt that Petitioner contemplated that lethal force would be used. Pet. App. A at ¶79.

Petitioner argued on direct appeal to the Mississippi Supreme Court that a sentencing jury's sole culpability finding that the defendant contemplated that lethal

force would be used "is not included in what *Enmund* and *Tison* require, and is therefore constitutionally insufficient to support a sentence of death . . . ." Appellant's Direct Appeal Brief at 17.[6] The Mississippi Supreme Court found that the jury's sole culpability finding, that Ambrose contemplated that lethal force would be used, did not render Petitioner's sentence of death unconstitutional pursuant to *Enmund*. Pet. App. A at ¶74-95. Relying on *Tison,* the Court also found that the *Enmund* culpability requirement was satisfied, "given Ambrose's major participation [in] the kidnapping, combined with reckless indifference to human life." Pet. App. A. at ¶85. The state court further held that Mississippi Code Annotated Section 99-19-101(7) does not offend *Enmund*. Pet. App. A at ¶¶80-84. The state court's findings are consistent with this Court's precedent.

This Court considered the constitutionality of a sentence of death returned for one convicted of felony murder who participated in the underlying felony but not the killing in both *Enmund* and *Tison*. This distinction alone removes Petitioner's case from the concerns of *Enmund* and *Tison* because Petitioner admitted at trial that he participated in the actual killing.

Earl Enmund did not personally commit the robbery (underlying felony) or the killing for which he was sentenced to death; the evidence presented at his trial suggested he was only guilty of aiding and abetting the robbery as the getaway driver. *Enmund*, 458 U.S. at 788. On certiorari review of his case, this Court held that an

[6]The Appellant's direct appeal brief (docket entry dated Jan. 6, 2017) may be accessed at https://courts.ms.gov/index.php?cn=82859#dispArea.

aider and abettor to the underlying felony may not, consistent with the Eighth Amendment, be sentenced to death if he "does not himself kill, attempt to kill, or **intend** that a killing take place or **that lethal force will be employed**." *Id*. at 797. As Enmund was not even present at the scene of the murder, the Court found that his culpability was limited to the underlying robbery and that the Eighth Amendment required his punishment to be tailored to his own culpability. *Id*. at 801. The *Enmund* court concluded that the sentence of death must be reversed "in the absence of proof that Enmund killed or attempted to kill, . . . [or] intended or **contemplated that life would be taken**[.]" *Id*. The converse of that finding is, necessarily, that had there been sufficient proof that Enmund "contemplated that life would be taken," as Ambrose's jury specifically found, then Enmund's sentence would not have violated the Eighth Amendment.

Five years later, the Court deviated from the holding announced in *Enmund*. Ricky and Raymond Tison were major participants in the underlying felonies of robbery and kidnapping, but did not actively participate in the killings for which they were convicted and sentenced to death. In *Tison*, the Court found that, "a narrow focus on the question of whether or not a given defendant 'intended to kill' . . . is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers." *Tison*, 481 U.S. at 158. The Court then broadened the range of acceptable culpability findings, holding that a participant in the underlying felony who did not kill, attempt to kill, or intend to kill, may be, consistent with the Eighth Amendment, sentenced to death so long as the actor was a "major participa[nt] in the

felony committed, combined with reckless indifference to human life." *Tison*, 481 U.S. at 158. In so holding, the *Tison* court expressly stated that it would not "attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty." *Id*. The *Tison* court made abundantly clear that a finding that the defendant actually killed or intended to kill is not required of a constitutionally permissible sentence of death so long as the defendant is a major participant in the underlying felony to the point that his actions suggest reckless disregard for human life. *Id*.

Enmund and *Tison* concern proportionality review of sentences of death for defendants who participated only in the underlying felony. Ambrose's culpability far exceeds that of Enmund and the Tison brothers. Ambrose, unlike Enmund, did not merely aid and abet the underlying felony without participating in the killing. Nor was he only a major participant in the underlying felony who played no part in the actual killing but who showed reckless indifference to human life. Unlike Enmund and the Tison brothers, Ambrose did participate in the actual killing. He was the ringleader of Trosclair's capital murder who kidnapped the victim and inflicted lethal blows. There can be no question about Ambrose's culpability as he participated in beating a man to death after having kidnapped him. As such, Ambrose's sentence of death does not raise the concerns addressed in *Enmund* or *Tison*.

Moreover, neither *Enmund* nor *Tison* concerned jury findings of statutory *Enmund* factors. Rather, in both *Enmund* and *Tison*, this Court conducted proportionality review to ensure that the record supported a finding that the sentences

of death in those cases were tailored to the defendants' culpability. *Cabana v. Bullock*, later clarified that an appellate court could constitutionally make the *Enmund* culpability finding(s) in the first instance where a jury did not. 474 U.S. 376, 384–87 (1986). The *Bullock* court explained, "the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case . . . has long been viewed as one that a trial judge or an appellate court is fully competent to make." *Id*. at 386. Further, the Court held, "*Enmund* does not impose any particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment." *Id*. Pursuant to *Bullock*, the Mississippi Supreme Court's record based finding that, "the evidence here was sufficient to satisfy *Enmund* culpability, given Ambrose's major participation of the kidnapping, combined with reckless indifference to human life" (Pet. App. A at ¶85) also defeats Petitioner's claim.

But Respondent need not rely on *Bullock* because Ambrose's jury did in fact find an *Enmund* factor - "contemplation that lethal force would be used." Although Ambrose claims that *Enmund* did not include contemplation that lethal force would be used as a sufficient culpability finding to support a sentence of death, the opinion explicitly states that is an appropriate factor. *See Enmund*, 458 U.S. at 797, 801 ("It is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or **intend** that a killing take place or **that lethal force will be employed**.");

("Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or **contemplated that life would be taken**, we reverse the judgment . . . .").

For the forgoing reasons, it is clear that the Mississippi Supreme Court correctly decided Petitioner's *Enmund* culpability claim in accord with this Court's precedent.[7]

Conclusion

Ambrose has presented nothing new or novel to cause this Court to retreat from decades of precedent. Accordingly, the petition for writ of certiorari should not issue.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Assistant Attorney General

LaDONNA C. HOLLAND
Special Assistant Attorney General
Counsel of Record

s/ LaDonna C. Holland

[7]To the extent Petitioner raises alternative arguments within his second assignment of error which were not raised in his *Enmund* argument to the Mississippi Supreme Court, the State of Mississippi respectfully submits that this Court is without jurisdiction to consider such alternative arguments. See *Webb v. Webb*, 451 U.S. 493 (1981); *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). "[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005)(quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)).

ATTORNEYS FOR RESPONDENT

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39206
Telephone: (601) 359-3680